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APPEAL

§§2-2(a), 2-2(b)
People v. Stevenson, 2011 IL App (1st) 093413 (No. 1-09-3413, 11/4/11)

Supreme Court Rule 606(b) provides that "[w]hen a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court," and a "new notice of appeal must be filed within 30 days following the entry of the order disposing of all timely filed postjudgment motions."

Defendant mailed a *pro se* motion to reconsider sentence from prison on the same date that the court denied trial counsel's timely-filed motion to reconsider sentence and that trial counsel filed a notice of appeal. The *pro se* motion raised the same issue raised in trial counsel's motion. The circuit court denied the *pro se* motion 18 months later, after defendant's appellate counsel had the motion placed on the circuit court's call for a ruling. The Appellate Court concluded for the following reasons that the *pro se* motion did not void the notice of appeal previously filed by counsel pursuant to Rule 606(b), and therefore it did not have jurisdiction to hear an appeal from the denial of that motion.

1. Defendant had no right to file a *pro se* post-sentencing motion. With the exception of post-trial motions alleging ineffective assistance of trial counsel, defendants represented by counsel have no authority to file *pro se* motions and the court should not consider such motions. The Appellate Court concluded that the record refuted that the trial court exercised its discretion to permit hybrid representation during the post-trial proceedings. Defendant never made a clear statement to the court that he wanted to proceed *pro se*, and the trial court informed defendant numerous times following the denial of his post-trial motion alleging trial counsel's ineffectiveness that he was represented by counsel and could not file any further *pro se* post-trial motions. The Appellate Court also rejected the argument that defendant was not represented by counsel at the time he filed his *pro se* motion as there was no indication in the record that trial counsel had asked for leave to withdraw.

2. Even assuming that defendant did have the right to file a *pro se* motion, the plain language of Rule 606(b) contemplates the filing of only one post-judgment motion directed against the conviction or the sentence or both. It does not authorize the filing of successive and repetitious motions that raise issues that were or could have been raised earlier and thereby extend the time for appeal.

3. Even if the trial court could be required to rule on a successive motion, defendant's *pro se* motion was not properly filed because no notice accompanied the motion that would have brought the motion to the attention of the trial court within a reasonable time. At the time that defendant filed his motion, 730 ILCS 5/5-8-1(c) provided that a post-sentencing motion would not be deemed timely filed "unless it is filed with the circuit court clerk within 30 days after the sentence is imposed together with a notice of motion, which notice shall set the motion on the court's calendar on a date certain within a reasonable time after the date of filing." The tolling provisions of Rule 606(b) were not triggered by the filing of the *pro se* motion due to defendant's failure to comply with this notice requirement.

4. Litigants may revest a court that has general jurisdiction over the matter with personal and subject matter jurisdiction after it has been lost if they actively participate without objection in further proceedings that are inconsistent with the merits of the prior judgment. The revestment doctrine did not apply in this case because the parties cannot divest the Appellate Court of jurisdiction it obtained with the filing of a notice of appeal and a certificate in lieu of record. Moreover, although the State did not object to the circuit court's jurisdiction to rule on the *pro se* motion, neither was its conduct inconsistent with the merits of the final judgment as the State defended the validity of the sentencing proceedings.

Although the notice of appeal filed by trial counsel following denial of his motion to reconsider did properly perfect an appeal from defendant's conviction, that appeal was dismissed on appellate counsel's motion, and the Appellate Court had lost jurisdiction to reinstate that appeal due to the passage of time.

(Defendant was represented by Assistant Defender Lindsey Anderson, Chicago.)

§§2-5(b), 2-6(a), 2-6(b)

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

1. Courts generally will not review moot issues. The purpose of this rule is to avoid consideration of cases where the parties no longer have a personal stake in the case's outcome. A case can become moot due to a change in circumstances while an appeal is pending.

There are three exceptions to the mootness doctrine: (1) the public-interest exception; (2) the capable-of-repetition-yet-evading-review exception; and the

collateral-consequences exception. The public-interest exception permits a court to consider an otherwise moot issue when: (1) the question presented is of a public nature; (2) an authoritative determination is necessary for future guidance of public officers; and (3) a likelihood exists that the question will recur.

The defendant's appeal from the dismissal of his post-conviction petition became moot due to defendant's completion of service of his sentence, including his MSR term. The question of whether the trial court can summarily dismiss a *pro se* post-conviction petition due to an unnotarized verification affidavit nonetheless could be reached under the public-interest exception.

The question of whether the trial court can summarily dismiss a petition due to an unnotarized verification affidavit is a question of a public nature that affects a large number of criminal defendants who file petitions every year. An authoritative determination is necessary for the future guidance of trial court judges, who are public officers. A likelihood exists that the issue will arise in the future in light of the sheer volume of petitions being filed and "the fact that this is at least the second case this year in which the State has argued that this is an appropriate basis for first-stage dismissal."

2. A void judgment may be attacked directly or collaterally in any court at any time. Although a reviewing court is not vested with authority to consider the merits of a case merely because the dispute involves an order that is or is alleged to be void, the lack of standing to file a post-conviction petition is not a jurisdictional defect that deprives the court of the authority to consider the merits of an argument that a judgment is void.

3. Generally, it is appellant's burden to properly complete the record on appeal. Any doubts arising from the incompleteness of the record will be construed against the appellant and in favor of the judgment rendered in the lower court. This rule is relaxed where the defendant can prove that the record is incomplete due to no fault of his own, as well as demonstrate that there is a colorable need for the missing portion of the record in order to have appellate review. If defendant can establish both prongs, the State then must show that there are other means to afford adequate review.

The indictment was not included in the record on appeal and both parties' efforts to locate a copy of the indictment were unsuccessful. The indictment was relevant to defendant's argument that his criminal conviction was void as it did not allege an offense that was subject to transfer from juvenile to criminal court. However, the court concluded that defendant had not established a colorable need

for the indictment as his claim that he was not charged with a transferable offense was based on speculation.

Defendant conceded that he did not know the exact language used in the indictment. He conceded that he may have committed a transferable offense. "Thus it appears from defendant's argument that it is equally probable that an error did or did not occur but he asks us to assume the former." Defendant's decision to waive reading of the indictment, and not to challenge his transfer to criminal court, even after it was questioned why defendant was before the criminal court, suggests that counsel's review of the indictment revealed no defects. "We will not equate defendant's fishing expedition with a colorable need for the indictment."

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

COLLATERAL REMEDIES

§§9-1(a), 9-1(b)(1), 9-1(d), 9-1(e)(1), 9-2(b)

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

1. The Post-Conviction Hearing Act provides that any person "imprisoned in the penitentiary" may seek relief under the Act. 725 ILCS 5/122-1(a). A remedy under the Act is only available to persons who are actually being deprived of their liberty, not persons who have completely served their sentences and merely wish to purge their criminal records of past convictions. Thus a defendant has standing under the Act so long as he is challenging a conviction for which he continues to serve some form of sentence. When a defendant's conviction is no longer an encumbrance on his liberty, he no longer needs assistance from the Act to secure his liberty, and the Act is no longer available to him.

2. The Appellate Court recognized that no court has previously addressed whether a defendant, who had standing under the Act to file a petition, subsequently loses standing when no portion of his sentence remains to be served. The court concluded that no meaningful distinction could be drawn between instances where a defendant's liberty is not encumbered when he files the petition and those instances in which a defendant regains his liberty after the petition is filed. In neither case is the purpose of the Act served by giving defendant relief.

Because defendant had completely served his sentence, including his MSR term, while his appeal from the dismissal of his post-conviction petition was pending, he no longer needed the Act's assistance to secure his liberty. Even if the cause were remanded, the trial court would be obligated to deny relief to defendant due to this defect. Therefore, the appeal from the dismissal of the petition was moot.

3. The Act allows summary dismissal at the first stage only where a defect renders the petition frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2). At the first stage, the court does not measure the petition's procedural compliance, only its substantive virtue.

The Act requires that the allegations of the petition be supported by "affidavits, records, or other evidence." 725 ILCS 5/122-2. The purpose of these affidavits is to show that the allegations can be objectively and independently corroborated, and therefore their absence can be the basis for a first-stage dismissal as they relate to the substance of the petition.

The Act also requires that the "proceedings shall be commenced by filing . . . a petition . . . verified by affidavit." 725 ILCS 5/122-1(b). The lack of notarization of the verification affidavit required by §122-1(b) does not qualify as the basis for a first-stage dismissal because that affidavit has no relation to the substance of defendant's allegations. The verification affidavit requirement merely confirms that the allegations are brought truthfully and in good faith.

The State can object to the lack of notarization at the second stage and appointed counsel can assist in arranging for notarization of the verification affidavit. The court found that addressing this defect at the second stage also comports with "practical considerations which arise in the prison system." Although not properly before the court, a memorandum written by a IDOC employee that was attached to defendant's reply brief stated that notaries are not always available in prisons. Defendant's affidavit in **People v. Wilborn**, 2011 IL App (1st) 092802, also indicated that prisoners lack the ability to have affidavits notarized.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

§9-2(c)

People v. Donelson, 2011 IL App (1st) 092594 (No. 1-09-2594, 11/9/11)

Where the applicable statutes required consecutive sentences for first degree murder, home invasion, and aggravated criminal sexual assault, the trial court entered a void sentence by imposing concurrent sentences of 50, 30, and 30 years, respectively. Because a void sentence can be corrected at any time, defendant could raise the issue by a §2-1401 petition filed outside the normal two-year statute of limitations.

The court rejected defendant's request to vacate his plea, however, finding that the plea agreement was not void and that the appropriate remedy was to vacate the sentences and remand the cause for resentencing. A plea agreement is void where an essential term of the agreement is unforceable or illegal under the relevant statutes. Whether a term or aspect of the agreement was essential is determined by its relative importance in light of the entire agreement.

Here, the essential terms of the plea agreement included that defendant entered a guilty plea to certain charges in return for a total sentence of 50 years. The court acknowledged that a plea agreement would be void if the agreed sentence could not be imposed under the relevant statutes; here, however, a total of 50 years could be imposed as consecutive sentences under the authorized sentencing ranges for the offenses. Because the essential terms of the plea agreement could be satisfied under the applicable statutes, remand for resentencing was appropriate.

Defendant's sentences were vacated and the cause remanded for imposition of consecutive sentences totaling the 50-year sentence contemplated by the plea agreement.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

CONFESSIONS

§10-3(c)

People v. Jordan, 2011 IL App (4th) 100629 (No. 4-10-0629, 11/14/11)

Statements obtained from the defendant during a custodial interrogation by the police are inadmissible unless preceded by defendant's waiver of his rights following **Miranda** warnings. Evidence seized as a result of information obtained

during an unwarned interrogation is likewise inadmissible as the fruit of the poisonous tree.

"Custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. An interrogation is custodial if under the circumstances of the questioning a reasonable person innocent of any crime would have felt he was not at liberty to terminate the interrogation and leave. Relevant factors are: (1) the time and place of the interrogation; (2) the number of police officers present; (3) the presence or absence of family or friends; (4) any indicia of a formal arrest procedure; and (5) the manner by which the individual arrived at the place of interrogation. Generally, due to the non-coercive aspects of ordinary traffic stops, a person temporarily detained during a traffic stop is not in custody, unless the person is thereafter subjected to treatment that renders him in custody for practical purposes.

The Appellate Court affirmed the trial court's finding that defendant's detention was custodial and no longer incident to an ordinary traffic stop when she confessed to possessing cannabis. The defendant was a passenger in a car stopped by the police. The police isolated her from the driver of the car in the rear seat of a squad car for 27 minutes before she confessed. This isolation allowed the police the advantage of playing her and the driver against each other. She was also locked in the squad car for 23 minutes and the police threatened to extend this detention indefinitely by indicating they intended to send for drug-detecting dogs. Defendant could have reasonably concluded that the police did not accept her initial insistence of innocence and that she would not be allowed to leave until she confessed to suspected wrongdoing.

Although the police told defendant she was not in any trouble, this assertion was contradicted by the police asking questions designed to elicit incriminating responses, locking defendant in the squad car, and conducting a full search of the car, including an anticipated dog sniff. The presence of twice as many police officers as detainees contributed to the police-dominated atmosphere and reinforced to defendant that she was targeted by the investigation. The Appellate Court also found it troubling that the police officer who interrogated defendant turned his microphone off and thus there was no audio portion of the eight minutes of the interrogation that resulted in the confession.

Because the police failed to give defendant **Miranda** warnings, the confession and cannabis seized by the police that was the fruit of that questioning were properly suppressed.

(Defendant was represented by Assistant Defender Molly Corrigan, Springfield.)

CONTEMPT OF COURT

§12-4

People v. Le Mirage, Inc., 2011 IL App (1st) 093547 (Nos. 1-09-3547 & 1-09-3549 cons., 11/16/11)

To sustain a charge of indirect criminal contempt, two elements must be proven beyond a reasonable doubt: (1) the existence of a valid court order; and (2) willful violation of that order by the respondent. Because of the liberty concerns implicated in criminal contempt proceedings and because contempt is such a drastic remedy, the underlying order must set forth with certainty, clarity, and conciseness precisely what actions are enjoined.

The Appellate Court reversed respondents' convictions for contempt for failure to comply with an agreed order entered in a building code violation proceeding. The order stated, "Mandatory order not to occupy 2d floor." The court found that the order was ambiguous and did not provide in reasonable detail the acts prohibited, because it was unclear whether the order referred to the second floor of the building, which was a nightclub, or the second floor of the nightclub, which was a mezzanine area containing VIP rooms.

The mezzanine area had been the subject of the code violations suit. After receiving clarification from counsel, the court wrote on the half sheet of that proceeding that the parties agreed to vacate the "2d floor VIP rooms." At a subsequent hearing, the city attorney clarified that the VIP rooms and mezzanine were the concern. Other statements by the parties and the court supported that conclusion. There was no evidence that the parties had agreed to close the nightclub, and in fact the city issued a liquor license to the nightclub as the suit continued. Therefore the order was not sufficiently specific to uphold a criminal contempt conviction for violating an order closing the entire nightclub.

COUNSEL

§§13-4(a)(1), 13-4(b)(6)(a)

People v. Woods, 2011 IL App (1st) 092908 (No. 1-09-2908, 11/22/11)

Defendant was convicted of armed robbery and first degree murder. The latter conviction was based on felony murder; the decedent was a co-participant with the defendant in the armed robbery, and was killed by police officers who were responding to the offense. There was a dispute in the evidence whether the co-participant was armed. On appeal, defendant claimed that trial counsel was ineffective when he conceded defendant's guilt of armed robbery in opening statements, thereby also conceding his guilt of felony murder.

1. To prevail on an ineffective assistance of counsel claim, the defendant must normally meet the **Strickland** standard, which requires showing that counsel's performance was objectively unreasonable and that there is a reasonable probability that with competent representation the result of the proceeding would have been different. However, if counsel entirely failed to subject the State's case to meaningful adversarial testing, the latter showing is unnecessary.

The Appellate Court held that **Strickland** applied here, as counsel did not fail to subject the State's case to meaningful adversarial testing. Although counsel conceded defendant's guilt of armed robbery, he continued to act as defendant's advocate, developed a theory of defense in opening and closing arguments, cross-examined witnesses, presented witnesses on defendant's behalf, and moved for a directed verdict.

2. The court concluded that defendant could not show that defense counsel acted unreasonably. The evidence that defendant committed an armed robbery was overwhelming, and a person who commits a felony is responsible for deaths that are the direct and foreseeable result of his actions. A felon is responsible for the death of a co-felon at the hands of police if the officers' actions were in direct response to an offense that was set in motion by the defendant and did not break the causal chain between defendant's acts and the co-felon's death.

Although counsel conceded defendant's guilt of armed robbery, for which there was overwhelming evidence, he argued that the death of the co-participant was not foreseeable where the police acted irrationally by firing 41 shots at a felon who was arguably unarmed and outnumbered by several officers. Counsel argued that it would be unfair to hold the defendant responsible for a co-felon's death caused by unforeseeable police misconduct.

Although "this appeal to the jury's sense of justice had no legal basis as a defense," courts have held that reliance on such arguments is not necessarily ineffective where the defendant insists on pleading not guilty in the face of overwhelming evidence of guilt. Where no other defenses are available, it is not necessarily ineffective to argue nonlegal defenses such as jury nullification or to appeal to the jury's sympathy.

The court also noted that defendant agreed on the record to defense counsel's strategy, and there was no evidence that his consent was based on any misunderstanding or that counsel misunderstood the applicable law.

3. Furthermore, defendant could not show prejudice under *Strickland*. In light of the overwhelming evidence of guilt, there was no reasonable probability that different tactics would have led to a different result. Although defendant claimed that he could have argued that he had withdrawn from the felony before the co-defendant was killed, he did not specify any evidence to support that defense. In addition, had defendant testified in support of a withdrawal defense, the State would have introduced defendant's videotaped statement contradicting that defense. Given the overwhelming evidence of guilt, there is little likelihood that such a strategy would have resulted in a different outcome at trial.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

DOUBLE JEOPARDY - COLLATERAL ESTOPPEL

§17-1

People v. Gay, 2011 IL App (4th) 100009 (No. 4-10-0009, 11/18/11)

The collateral estoppel doctrine bars relitigation of an issue already decided in a prior case. The doctrine has three requirements: (1) the court rendered a final judgment in the prior case; (2) the party against whom the estoppel is asserted was a party or in privity with a party in the prior case; and (3) the issue decided in the prior case is identical to the one represented in the instant case.

Erroneous judgments as well as correct ones are protected by the rule of collateral estoppel. The remedy for a legally incorrect or logically inconsistent

decision is an appeal. The error, no matter how egregious, cannot be raised in a collateral proceeding.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

GUILTY PLEAS

§§24-1, 24-3

People v. Donelson, 2011 IL App (1st) 092594 (No. 1-09-2594, 11/9/11)

Where the applicable statutes required consecutive sentences for first degree murder, home invasion, and aggravated criminal sexual assault, the trial court entered a void sentence by imposing concurrent sentences of 50, 30, and 30 years, respectively. Because a void sentence can be corrected at any time, defendant could raise the issue by a §2-1401 petition filed outside the normal two-year statute of limitations.

The court rejected defendant's request to vacate his plea, however, finding that the plea agreement was not void and that the appropriate remedy was to vacate the sentences and remand the cause for resentencing. A plea agreement is void where an essential term of the agreement is unforceable or illegal under the relevant statutes. Whether a term or aspect of the agreement was essential is determined by its relative importance in light of the entire agreement.

Here, the essential terms of the plea agreement included that defendant entered a guilty plea to certain charges in return for a total sentence of 50 years. The court acknowledged that a plea agreement would be void if the agreed sentence could not be imposed under the relevant statutes; here, however, a total of 50 years could be imposed as consecutive sentences under the authorized sentencing ranges for the offenses. Because the essential terms of the plea agreement could be satisfied under the applicable statutes, remand for resentencing was appropriate.

Defendant's sentences were vacated and the cause remanded for imposition of consecutive sentences totaling the 50-year sentence contemplated by the plea agreement.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

INDICTMENTS, INFORMATIONS, COMPLAINTS

§29-4(a)

People v. Rich, 2011 IL App (2d) 101237 (No. 2-10-1237, 11/3/11)

Under 720 ILCS 5/6-1, a criminal conviction cannot be entered for an offense which occurred when the defendant was under the age of 13. Thus, the trial court properly dismissed an indictment which alleged that defendant committed aggravated criminal sexual assault when he was 12 years old.

INSANITY – MENTALLY ILL – INTOXICATION

§30-2

People v. McMillen, 2011 IL App (1st) 100366 (No. 1-10-0366, 11/17/11)

1. Involuntary intoxication constitutes an affirmative defense where the intoxicated or drugged condition is involuntarily produced and results in a deprivation of substantial capacity to either appreciate the criminality of one's conduct or to conform such conduct to the requirements of the law. Under **People v. Hari**, 218 Ill.2d 275, 843 N.E.2d 349 (2006), an involuntary intoxication defense may arise from the unexpected and unwarned adverse side effects of prescription medication.

The Appellate Court concluded, however, that **Hari** does not authorize an involuntary intoxication defense where the defendant suffers adverse side effects from a combination of prescription medication and illegal substances which were knowingly consumed. In other words, "the knowing, or voluntary, ingestion of . . . illegal drugs precludes the use of the involuntary intoxication defense" even where the defendant also consumed prescription medication. "[T]he **Hari** holding does not support the proposition that mixing prescription medication with illegal drugs gives rise to the involuntary intoxication defense."

2. In any event, the **Hari** doctrine would not apply where the defendant consumed four prescription medications along with cocaine. **Hari** holds that an involuntary intoxication defense may arise where the defendant suffers an unanticipated reaction to prescription medication. The court concluded that because the adverse effects of mixing cocaine and prescription medications is well-

known, and excessive cocaine use alone is commonly known to produce adverse side effects, "it is common knowledge that adverse side effects may result when cocaine is used along with four other prescription medications." Thus, defendant's reaction could not be said to be unanticipated.

The court added that the record showed that defendant had been on the prescription medication for at least six months, raising further doubts concerning any claim that the adverse effects of the medication were unknown to him.

Because defendant lacked a reasonable basis to present an involuntary intoxication defense based on the combination of cocaine and prescription medication, the trial court properly dismissed as patently without merit a post-conviction petition which argued that defendant had been deprived of his constitutional right to present a complete defense.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

JURY

§32-8(a)

People v. Lloyd, 2011 IL App (4th) 100094 (No. 4-10-0094, 11/16/11)

For purposes of the criminal sexual assault statute, 720 ILCS 5/12-12(f) defines "sexual penetration" as involving two broad categories of conduct. The first category includes any contact "between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person." Within this category, the term "object" does not include parts of the defendant's body, including fingers. The second category includes any "intrusion of any part of the body of one person . . . into the sex organ or anus of another person."

Defendant was convicted of criminal sexual assault for acts of "sexual penetration" involving his fingers and the complainant's vagina. At the State's request and without objection by the defense, the trial court gave the jury only the portion of IPI Crim. 4th, No. 11.65E concerning the first category - "contact" between the complainant's sex organ by "an object, the sex organ, mouth or anus of" the defendant.

The court concluded that concerning three of the four convictions, failing to give the proper definition of "sexual penetration" did not constitute plain error.

For each of the three convictions, the complainant's testimony clearly demonstrated that defendant inserted his fingers into her vaginal opening. Because the uncontroverted evidence showed digital penetration, the result of the trial on those convictions would not have been different had the proper instruction been given.

Concerning the other conviction, however, the complainant's testimony did not clearly show penetration by the defendant's fingers. Based on the evidence, the jury could have found that no penetration occurred. Concerning this count, therefore, plain error occurred because the incorrect definitional instruction could have affected the outcome of the trial.

Defendant's criminal sexual assault conviction for Count I was reversed, but the other three convictions were affirmed.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

§32-8(i)

People v. Richardson, 2011 IL App (4th) 100358 (No. 4-10-0358, 11/29/11)

Generally, any error relating to jury instructions is forfeited if the defendant does not object or proffer alternative instructions at trial. An exception exists for the failure to instruct on the elements of a crime. The decision whether to instruct the jury on a lesser offense rests with defendant and is one of trial strategy.

Defendant elected to represent himself at trial. Therefore he was responsible for his own representation and was held to the same standards as any attorney. The court had no duty to advise defendant to introduce a lesser-offense instruction *sua sponte* or to inform defendant of the possibility of introducing the jury instruction. Because defendant represented himself at trial, he could not have usurped the decision whether to tender the instruction. Therefore, no error occurred.

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

JUVENILE

§§33-3, 33-7(b)

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

With certain limited exceptions, a minor under 17 years of age at the time of an alleged offense may not be prosecuted under the criminal laws of Illinois. 705 ILCS 405/5-120. One such exception is where a minor who at the time of the offense was at least 15 years of age and who is charged with an offense under §401 of the Controlled Substances Act while on a public way within 1000 feet of the real property comprising a school. 705 ILCS 405/5-130(2)(a). A criminal conviction of such a minor where a violation of §401 is committed within 1000 feet of a school, but not on a public way, is void because the court lacks the power to impose a criminal conviction where the Juvenile Act mandates a juvenile adjudication.

Defendant pleaded guilty to a violation of §401 committed within 1000 feet of a school, but that offense does not require as an element that it be committed on a public way. It could not be determined whether defendant's indictment included a public-way allegation because the indictment was not included in the record on appeal. Construing any doubts arising from the missing indictment against the defendant, defendant did not demonstrate that his conviction was void.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

§§33-5(a), 33-9

People v. Rich, 2011 IL App (2d) 101237 (No. 2-10-1237, 11/3/11)

The State filed a criminal complaint charging defendant, who was 20 years old, with two counts of aggravated criminal sexual assault occurring when defendant was between 12 and 14 years old. Three months later, while defendant was still 20, he was charged by indictment with the same offenses.

When defendant turned 21, the State filed a superseding indictment charging the same offenses. The trial court granted a motion to dismiss the indictment, finding that because defendant was at most 14 when the offenses were committed, he could be prosecuted only under the Juvenile Court Act. Under **In re Luis R.**, 388 Ill.App.3d 730, 924 N.E.2d 990 (2d Dist. 2009), delinquency

proceedings may not be commenced against an adult regardless of his or her age at the time of the offense.

The Appellate Court affirmed the dismissal of the indictment.

1. First, under 720 ILCS 5/6-1, a criminal conviction cannot be entered for an offense which occurred when the defendant was under the age of 13. Thus, the trial court properly dismissed an indictment which alleged that defendant committed aggravated criminal sexual assault when he was 12 years old.

2. Alternatively, the trial court properly dismissed the indictment concerning offenses allegedly committed when the defendant was 13 or 14. The Juvenile Court Act (705 ILCS 405/5-120) governs crimes committed by minors who were under the age of 17 at the time of the offenses. Unless one of four exceptions apply, acts committed by a minor are not subject to criminal prosecution.

The four exceptions include: (1) violations of traffic, boating, or fishing and game laws; (2) offenses subject to automatic transfer provisions which mandate adult prosecution for specified offenses where the minor was at least 15 years old at the time of the offense; (3) where the State successfully moves to transfer the offense to adult criminal court; and (4) where the State successfully moves to extend juvenile court jurisdiction, which permits the imposition of a sentence under the Code of Corrections in addition to a sentence under the Juvenile Court Act, with the adult sentence stayed so long as offender complies with the juvenile sentence.

Because the alleged offenses occurred when the defendant was 13 or 14, the automatic transfer exception did not apply. Although aggravated criminal sexual assault is subject to automatic transfer when the defendant was 15 at the time of the offenses, the court concluded that the General Assembly did not intend to apply the automatic transfer provisions to crimes which were committed by minors under the age of 15, even if the defendant has become an adult by the time the charges are initiated.

3. Furthermore, neither the third nor fourth exceptions applied where the State failed to file timely motions to either transfer the cause to adult court or to extend juvenile jurisdiction. The court stressed that the State would not have been left without a remedy had it acted properly. The State first filed criminal charges some six months before defendant turned 21; had it instituted juvenile proceedings instead, it would have had ample time before defendant turned 21 to seek either transfer to adult court or extended juvenile jurisdiction. Under either scenario, the proceedings could have continued after the defendant reached 21.

"[W]hile the State is correct that it was not *required* to file against defendant an initial petition or a motion to transfer or extend jurisdiction under the Act, its failure to do so precludes prosecution after defendant's twenty-first birthday."

4. The court declined to decide whether a defendant who has turned 21 can be charged with an automatic transfer offense which was committed when the defendant was 15 or older.

PAROLE, PARDONS & PRISONERS RIGHTS

§37-1(a)

People v. McCurry, 2011 IL App (1st) 093411 (No. 1-09-3411, 11/23/11)

Under 730 ILCS 5/5-8-1(d)(4), the mandatory supervised release term for criminal sexual assault "shall range from a minimum of three years to a maximum of the natural life of the defendant." Noting a conflict in appellate precedent, the court concluded that §5-8-1(d)(4) was intended to require the trial court to set an indeterminate MSR term of three years to natural life, with the Prisoner Review Board deciding, on a case-by-case basis, when a particular offender is unlikely to reoffend and can be safely released from MSR.

The court rejected the argument that the trial judge is required to set an MSR term of a fixed number of years between three years and natural life. The court concluded that the goal of preventing recidivism would not be served by having the trial judge set an MSR term at sentencing and having the Prisoner Review Board determine, years later, whether the offender is likely to recidivate. (**Note**: This issue is currently pending before the Illinois Supreme Court in **People v. Rinehart**, No. 111719.)

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

REASONABLE DOUBT

§42-1
People v. Vaughn, 2011 IL App (1st) 092834 (No. 1-09-2834, 11/23/11)

The State must prove the *corpus delicti* of an offense beyond a reasonable doubt. *Corpus delicti* cannot be proved by defendant's confession alone. There must be some evidence independent of the confession tending to show that the crime did occur, but that independent evidence need not by itself prove the existence of the crime beyond a reasonable doubt. This corroboration requirement exists due to a general mistrust of extrajudicial statements, which may be unreliable. This mistrust does not extend to in-court testimony.

The defendant's own in-court testimony on cross-examination admitting that he committed an act of penetration provided sufficient corroboration for his confession to that act of penetration. Any confusion on defendant's part could have been cleared up on redirect examination, but none was conducted.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

SEARCH & SEIZURE

§§44-1(a), 44-5(a)
People v. Fitzpatrick, 2011 IL App (2d) 100463 (No. 2-10-0463, 11/3/11)

A custodial arrest for a misdemeanor punishable by fine only does not violate the federal constitution's prohibition of unreasonable searches and seizures. **Atwater v. City of Lago Vista**, 532 U.S. 318 (2001). The Illinois Supreme Court has not yet clearly addressed whether the Illinois Constitution's counterpart to the Fourth Amendment (Ill. Const. 1970, Art. I, §6) permits the police to conduct a custodial arrest for a petty offense. Illinois Supreme Court decisions addressing the permissible scope or duration of a traffic stop where there was no initial arrest for the traffic violation have no bearing on this question.

Illinois follows a limited lockstep approach to interpreting state constitutional guarantees that correspond to rights secured by the United States Constitution. State constitutional provisions are interpreted in harmony with their federal counterparts unless a specific criterion, such as unique state history or state experience, justifies departure from federal precedent. An arguably flawed

federal analysis is not a reason to depart from United States Supreme Court precedent.

Finding no reason to depart from federal precedent, the court concluded that a custodial arrest for the petty offense of walking in the middle of a public road (625 ILCS 5/11-1007(a)) did not violate the state constitution. The trial court did not err in refusing to suppress the fruit of the search of defendant's person conducted at the police station following that arrest.

(Defendant was represented by Assistant Defender Barb Paschen, Elgin.)

§44-4(b)

People v. Rhinehart, 2011 IL App (1st) 100683 (No. 1-10-0683, 11/30/11)

A police officer may conduct a brief, investigatory stop of an individual when the officer has a reasonable, articulable suspicion of criminal activity. While reasonable suspicion is less demanding than probable cause, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. An anonymous tip alone is not sufficiently reliable to justify an investigatory stop because it seldom demonstrates the informant's basis for knowledge or veracity. **Florida v. J.L.**, 529 U.S. 266 (2000).

An unidentified citizen flagged down a police officer and informed him that a black male wearing a white shirt and yellow pants had a gun and was at a specific location, which the officer testified was a high-crime area. The police proceeded to that location and saw defendant who matched the description. The officer conducted a pat down of the defendant and found a gun. A man standing next to defendant fled from the police. The police later learned that he was the defendant's brother.

Although the officer received the anonymous tip in person, rather than over the phone as in **J.L.**, allowing the officer to develop an impression of her credibility from her appearance and tone of voice, the State must still point to specific, articulable facts that gave rise to the officer's reasonable suspicion of criminal activity. The State presented no evidence explaining the reasons the officer considered the informant reliable where the officer did not know the informant's identity.

No other circumstances exist that created reasonable suspicion for the stop. The fact that defendant's brother fled does not cast suspicion on defendant, especially where the police did not know they were brothers at the time of the stop. The mere fact that informant accurately described defendant's location and clothing does not show that the informant had knowledge of concealed criminal activity. That the stop occurred in a high-crime area is insufficient to justify the stop.

The court should have granted the motion to suppress. Because the State could not prove that defendant possessed the handgun without the suppressed evidence, his convictions for aggravated unlawful use of a weapon and defacing identification marks of a firearm were reversed.

(Defendant was represented by Assistant Defender Benjamin Wimmer, Chicago.)

§44-13

People v. Cregan, 2011 IL App (4th) 100477 (No. 4-10-0477, 11/29/11)

After receiving an anonymous tip that defendant would be traveling by train to Normal, three Normal police officers went to the station to arrest defendant on a civil warrant for failure to pay child support. When the three officers approached defendant, he was carrying a laundry bag and wheeling a luggage bag behind him. At the officers' order, the defendant dropped the bags and placed his hands behind his back. He was then placed in handcuffs.

A female companion approached defendant after he was handcuffed, and defendant asked the officers if his companion could take the bags. One of the officers responded that the officers needed to search the bags first. Nothing suspicious was found during the search. However, the officer who was conducting the search opened a container of hair gel and found that it contained what appeared to be cocaine. Defendant was subsequently convicted of unlawful possession of less than 15 grams of cocaine and sentenced to five-and-one-half years imprisonment.

The Appellate Court affirmed the trial court's denial of defendant's motion to suppress.

1. Warrantless searches and seizures generally violate the Fourth Amendment, subject only to a few specifically established and well-defined exceptions. One such exception is the search incident to arrest doctrine. Under that doctrine, where a lawful arrest is made, the officer may search the person of the arrestee and the area within his immediate control. The "area within an arrestee's immediate control" is the area from which the arrestee might gain possession of a weapon or destroy evidence. The search incident to lawful arrest exception is justified by concerns for officer safety and the preservation of evidence.

2. The search of the luggage was proper incident to the arrest although defendant was handcuffed and surrounded by three officers. Generally, the search incident to arrest doctrine authorizes warrantless searches of the contents of hand carried luggage which is seized incident to and inspected contemporaneously with a lawful custodial arrest. Although **Arizona v. Gant**, 556 U.S. 332 (2009) held that the search incident to arrest exception does not apply if there is no possibility that an arrestee could reach into the area of the search, the court concluded that **Gant** applies only to searches involving vehicles which were recently occupied by the arrestee. The court found that **Gant** was not intended to change precedent allowing police to search personal items carried by the arrestee at the time of the arrest, even if the arrestee cannot physically access those items.

The court also stressed that the defendant was a known gang member, and that one officer testified that he was concerned the bag might contain a dangerous weapon. Under these circumstances, interests of officer safety justified the search incident to arrest.

3. In conducting the search, the police were not limited to searching for evidence of failure to pay child support, the crime for which the defendant had been arrested. A search for weapons is just as important as a search for evidence of a crime. Furthermore, the fact that the officers do not expect to uncover evidence of the crime for which the arrest was made does not limit the scope or intensity of a search of personally carried items incident to arrest. "The situation afforded the officers wide latitude to conduct a thorough search of defendant's luggage, including the container of hair gel located inside."

4. Similarly, the police were not required to give the bags to defendant's female companion without searching them. Giving unsearched luggage to an associate of a known gang member would raise concerns of officer safety, because the luggage might contain weapons that could be turned on the police.

Defendant's conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Amber Gray, Springfield.)

SENTENCING

§§45-1(a), 45-1(b)(2)

People v. Gay, 2011 IL App (4th) 100009 (No. 4-10-0009, 11/18/11)

1. The Eighth Amendment cruel-and-unusual-punishments clause embodies two distinct propositions. One prohibits the imposition of inherently barbaric punishments under all circumstances. The other embodies a narrow proportionality principle that forbids extreme sentences grossly disproportionate to the crime.

Prior to the decision in **Graham v. Florida**, 560 U.S. ___, 130 S.Ct. 2011, ___ L.Ed.2d ___ (2010), cases challenging the proportionality of a sentence to the crime were divided into two discrete categories: those involving a term of years and those involving the death penalty. In cases challenging a term-of-years sentence, the analysis begins by comparing the gravity of the offense to the severity of the sentence. In cases challenging a capital sentence, the death penalty may be found categorically cruel and unusual based on either the nature of the offense or the characteristics of the offender. In **Graham**, the court for the first time recognized a categorical limitation on a non-capital sentence of natural life without parole for juvenile, non-homicide offenders.

2. Defendant received consecutive sentences totaling 97 years for 16 aggravated battery convictions based on his behavior toward DOC employees. The court held that his aggregated sentence resulting from multiple convictions could not be considered a life-without-parole sentence. A sentence of life without parole is tied to a single conviction and is absolute in its duration for the offender's natural life. The Eighth Amendment allows state to punish offenders for each crime they commit, regardless of the number of convictions or the duration of the sentences they have already accrued.

3. A two-step analysis is employed to determine whether a punishment is categorically unconstitutional. First, the court considers objective indicia of society's standards as expressed in legislative enactments and state practice to determine if there is a national consensus against the sentencing practice at

issue. Second, the court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Punishing mentally-ill prisoners by sentencing them to natural life without parole is not categorically cruel and unusual. There is no consensus against punishment of mentally-ill offenders. Unlike persons with abnormally-diminished intellectual functioning, offenders whose mental illness falls short of criminal insanity are not less culpable than other offenders generally. The penological ends of retribution and incapacitation are also met by allowing courts to sentence mentally-ill persons as severely as others.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

§45-1(b)(3)

People v. Crawford, 2011 IL App (2d) 100533 (No. 2-10-0533, 11/21/11)

Except for the fact of a prior conviction, any fact that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Every fact affecting the defendant's sentence is not an element of the offense, even though it may have a substantial impact.

Defendant was charged with a Class 3 felony, which is punishable by a period of probation, a term of periodic imprisonment, a term of conditional discharge, or a term of imprisonment of not less than two years and not more than five years. The Code of Corrections also contains a provision that the court "shall impose a sentence of probation" unless it makes one of the enumerated findings. 730 ILCS 5/5-6-1(a).

This provision did not convert the maximum sentence to which defendant could be sentenced without an additional finding from five years' imprisonment to probation. The enumerated findings that the court was required to make before imposing a sentence other than probation were mere sentencing factors that guided the court's discretion in imposing a sentence at or below the statutory maximum.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

§45-7(a)

People v. Dickey, 2011 IL App (3d) 100397 (No. 3-10-0397, 11/16/11)

The court is required to order restitution when, among other things, the defendant's criminal actions caused personal injury. 730 ILCS 5/5-5-6. The court must determine the actual costs incurred by the victim; a guess is not sufficient. The court is also required to consider the defendant's ability to pay in determining whether restitution should be paid in a single payment or in installments. If the court orders that the restitution be paid over a period of greater than six months, the court is required to order that defendant make monthly payments, unless the court waives this requirement by making a specific finding of good cause for waiver. 730 ILCS 5/5-5-6(f).

The trial court's order that defendant make restitution in a specific amount was supported by the presentence report containing the victim's bills for medical care in that amount. The court ordered that the restitution be paid within the 30-month term of probation, but did not consider defendant's ability to pay in setting the time for payment of restitution. Nor did the court make any finding of good cause to waive the required monthly payments. The cause was remanded for the trial court to consider defendant's ability to pay in setting the time within which restitution must be paid.

§45-14(c)

People v. Geiger, 2011 IL App (3d) 090688 (No. 3-09-0688, 11/10/11)

A reviewing court may not alter a sentence absent an abuse of discretion. A sentence is an abuse of discretion if it is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. A reviewing court cannot substitute its judgment for that of the trial court merely because it would have weighed the relevant sentencing factors differently.

Even though reasonable people could conclude that defendant's 20-year sentence for direct criminal contempt based on his refusal to testify at a double-murder trial was excessive, it was not an abuse of discretion. While the defendant's conduct was not violent, defendant possessed material and significant knowledge of the facts. Although the prosecution obtained a conviction without his testimony, his refusal to testify did real harm to the court and its authority

and was calculated to obstruct or hinder the court in its administration of justice. According to the trial judge, defendant's scorn for the judicial system was visible in his face when he refused to testify.

At the age of 25, defendant had already received sentences of six months in jail, two concurrent two-year terms of incarceration, a four-year term and a six-year term. Although he purported to invoke his Fifth Amendment privilege in refusing to testify, the court informed him that he had no Fifth Amendment right to refuse to testify, the defendant could not explain the basis for his belief that he could refuse to testify, and the prosecution offered him immunity for his testimony. The court warned defendant that he could be sentenced to a period of years if he refused to testify, and the State's contempt petition requested that defendant be sentenced to 20 years should he refuse to testify. Thus the record belies defendant's assertion that he operated under a mistaken belief that he had a right not to testify or that he had no idea that he could be sentenced to 20 years should he refuse to testify. That there is no published decision affirming a 20-year sentence for contempt is irrelevant.

(Defendant was represented by Assistant Defender Fletcher Hamill, Ottawa.)

SEX OFFENSES

§46-2(a)

People v. Lloyd, 2011 IL App (4th) 100094 (No. 4-10-0094, 11/16/11)

Defendant was charged with seven counts of criminal sexual assault under 720 ILCS 5/12-13(a)(2), which defines the offense as committing an act of "sexual penetration" where "the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent." The complaining witness was 13 the time of the alleged offenses. The State did not argue that the complainant was unable to understand the nature of the acts, but claimed that §12-13(a)(2) applied because under Illinois law, a 13-year-old is "unable to give knowing consent." In most cases, the age to consent in Illinois is 17, although in a few instances it is 18.

1. The majority concluded that §12-13(a)(2) is broad enough to include acts committed against a person who is legally unable to consent because of her age. The court acknowledged that in other sections of the Criminal Code the legislature specifically criminalized sexual acts committed against persons who are under the

age of consent. The court concluded, however, that the legislature did not intend to exclude such acts from prosecution under §12-13(a)(2).

The court also noted that unlike statutes outlawing sexual activity based on age, in a prosecution under §12-13(a)(2) the State must prove not only the complainant's age but also that the defendant knew the complainant could not legally consent. "[B]ecause the State has to prove the accused knew the victim was unable to consent, it would be highly unlikely any sexual contact between two similarly aged teenagers under 17 or sex with a person almost 17 would be punishable under section 12-13(a)(2)."

The court found that the evidence showed that the defendant knew the complainant's age and that she could not legally consent to sexual activity. Therefore, defendant was properly convicted under §12-13(a)(2).

2. In dissent, Justice Steigmann found that §12-13(a)(2) was intended, and has been traditionally interpreted, to apply in two instances: (1) where the victim is unable to understand the act, and (2) where due to her mental condition the victim is unable to give consent. Justice Steigmann rejected the argument that §12-13(a)(2) applies where the victim is unable to give consent merely because she is under the age of consent. Those crimes are prosecuted under other statutes which provide varying penalties; §12-13(a)(2) authorizes a non-probationable Class 1 felony conviction, while aggravated criminal sexual abuse based on the complainant's age is a probationable Class 2 felony.

The dissent expressed concern that under the majority's reasoning, a 17-year-old male who engages in sexual penetration with a girlfriend who is one month under the age of 17 can be convicted under §12-13(a)(2) of a non-probationable Class 1 felony. Justice Steigmann rejected the majority's view that such prosecutions would be rare because the State would be required to prove that the defendant knew the victim was unable to consent; the construction of a criminal statute "should not be based upon the hope that no prosecutor will ever bring ridiculous charges."

The dissent concluded that the evidence clearly showed that the defendant committed an offense which the State did not charge - aggravated criminal sexual abuse. However, the record did not support criminal sexual assault, the offense which the State chose to prosecute.

Justice Steigmann added:

> In my 22-years on this court, I have never written an opinion to reverse a criminal conviction based on the insufficiency of the State's evidence. Nor have I written a dissent, as this one, arguing that the majority has erred by failing to reverse a defendant's conviction on the grounds of insufficient evidence. This long-standing record is in no small measure due to my deference to the trier of fact and my unwillingness to second-guess it.
>
> This case is different. Here, we need not reweigh the evidence because there is no evidence to weigh. Once the State's claim is rejected – that based solely on [the complainant's] age, she was unable to understand the nature of the act or unable to give knowing consent – this record is bereft of any evidence to sustain defendant's convictions.

3. For purposes of the criminal sexual assault statute, 720 ILCS 5/12-12(f) defines "sexual penetration" as involving two broad categories of conduct. The first category includes any contact "between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person." Within this category, the term "object" does not include parts of the defendant's body, including fingers. The second category includes any "intrusion of any part of the body of one person . . . into the sex organ or anus of another person."

Defendant was convicted of criminal sexual assault for acts of "sexual penetration" involving his fingers and the complainant's vagina. At the State's request and without objection by the defense, the trial court gave the jury only the portion of IPI Crim. 4th, No. 11.65E concerning the first category - "contact" between the complainant's sex organ by "an object, the sex organ, mouth or anus of" the defendant.

The court concluded that concerning three of the four convictions, failing to give the proper definition of "sexual penetration" did not constitute plain error. For each of the three convictions, the complainant's testimony clearly demonstrated that defendant inserted his fingers into her vaginal opening. Because the uncontroverted evidence showed digital penetration, the result of the trial on those convictions would not have been different had the proper instruction been given.

Concerning the other conviction, however, the complainant's testimony did not clearly show penetration by the defendant's fingers. Based on the evidence, the jury could have found that no penetration occurred. Concerning this count, therefore, plain error occurred because the incorrect definitional instruction could have affected the outcome of the trial.

Defendant's criminal sexual assault conviction for Count I was reversed, but the other three convictions were affirmed.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

SPEEDY TRIAL

§47-2

People v. Gay, 2011 IL App (4th) 100009 (No. 4-10-0009, 11/18/11)

1. Independent of statutes of limitation, the due process clause of the Fifth Amendment plays a limited role in protecting against oppressive delay between the commission of an offense and the bringing of charges. To establish a due process violation as a result of preindictment delay, the defendant must initially show that he was actually and substantially prejudiced by the delay. A witness's inability to recall events, a witness's unavailability, the unavailability or the destruction of evidence, or an increased probability of a wrongful conviction may constitute cognizable prejudice resulting from preindictment delay.

The burden then shifts to the State to establish the reasonableness of the delay. If both prejudice and reasonableness of the delay are shown, the court must make a determination based on a balancing of the interests of the defendant and the public, considering, among other factors, the length of the delay and the seriousness of the offense.

2. The defendant claimed that he suffered prejudice when the State staggered its indictments so that no more than two to four charges pended against defendant at any one time, thus subverting defendant's statutory speedy-trial rights. This claim had no basis in fact where the defendant was tried 38 days after he was sentenced on previous cases, well within the 160-day period allowed by statute. 725 ILCS 5/103-5(e).

3. Even if the preindictment delay had allowed the State to subvert defendant's right to a speedy trial, this supposed advantage did not implicate due process concerns.

A delay in bringing charges until the prosecution is certain that it can proceed to trial with reasonable speed is not a delay for a tactical purpose. The filing of an indictment constricts prosecutorial resources. It is therefore left to prosecutors to determine how much responsibility they can afford to undertake and to weigh costs with the public's interest in justice. The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment.

Accepting the defendant's argument that unconstitutional delay results from the staggering charges to avoid running afoul of the speedy-trial statute would lead to absurd results. A defendant who commits multiple offenses in a brief period could avoid prosecution by standing on his speedy-trial rights.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

STATUTES

§48-1

People v. Gay, 2011 IL App (4th) 100009 (No. 4-10-0009, 11/18/11)

The Illinois Administrative Code establishes a scheme for punishing DOC inmates who violate internal disciplinary rules. As an independent penal mechanism, nothing in the Code prevents an inmate from facing disciplinary charges and state criminal charges for a single unlawful act.

Offense No. 501 of the Code defines "violating state or federal laws" as "committing any act that would constitute a violation of state or federal law," and provides that "[i]f the specific offense is stated elsewhere in this Part, an offender may not be charged with this offense except as otherwise provided in this Section." 20 Ill. Adm. Code 504 app. A. Under this provision, a prisoner may not be cited for this offense unless either: (1) no other disciplinary offense is implicated by the offender's behavior; or (2) another section in the table of offenses allows citation of both offenses.

Defendant received a citation for offense No. 102, assaulting any person, rather than for offense No. 501, violating state or federal laws. The court rejected the argument that because defendant was not cited for a violation of offense No. 501, he could not be subject to criminal prosecution. The legislature could not have intended the absurd result that disciplinary offenses that constitute crimes may not be charged as offense No. 501, and that disciplinary offenses not charged as offense No. 501 may not be prosecuted as crimes.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

TRAFFIC OFFENSES

§50-2(c)

People v. Clairmont, 2011 IL App (2d) 100924 (Nos. 2-10-0924 & 2-10-0925 cons., 11/29/11)

When a motorist files a motion *in limine* to bar breath test results, the State must establish a sufficient foundation for the admission of the evidence by establishing that the test was performed in accordance with 625 ILCS 5/11-501.2(a) as well as the regulations promulgated by the Illinois Department of State Police.

Those regulations create a rebuttable presumption that an instrument was accurate at the particular time a subject test was performed when four conditions are met, one of which is that "[a]ccuracy checks have been done in a timely manner, meaning not more than 62 days have passed since the last accuracy check prior to the subject test." 20 Ill. Adm. Code 1286.200. The regulations also require that accuracy tests be performed every 62 days, to ensure the continued accuracy of approved evidentiary instruments. 20 Ill. Adm. Code 12686.230.

If checks could be performed only as required by §1286.200, a defendant could be convicted with evidence from an instrument that had not been tested for 62 days. So as not to render §1286.230 superfluous, and to read the two sections in harmony, evidentiary instruments must be tested for accuracy once every 62 days to ensure the reliability of test results. Noncompliance with this regulation invalidates test results and renders them inadmissible, unless the State rebuts the presumption of unreliability with proof that a test result is valid despite the lack of strict compliance with the regulation.

In these consolidated cases, the breath test machine used for Clairmont was checked and certified 60 days before he was tested and not again for 11 days after he was tested. The machine used for Fernandez was checked and certified three days before he was tested and not again until 62 days after he was tested. The State expressly disclaimed reliance on any theory of substantial compliance at the hearing below. Because accuracy tests were not performed every 62 days, the trial court correctly held the test results inadmissible in both cases.

Bowman, J., dissented. Failure to check the accuracy of the machine every 62 days did not automatically rebut the presumption of accuracy. That failure is merely a factor for the court to consider along with other relevant evidence in determining whether the defendant presented sufficient evidence to rebut the presumption of accuracy.

WAIVER - PLAIN ERROR - HARMLESS ERROR

§56-1(b)(3)(b)

People v. Cregan, 2011 IL App (4th) 100477 (No. 4-10-0477, 11/29/11)

Although both a trial objection and a post-trial motion raising the issue are normally required to preserve an issue for appeal, constitutional issues which were properly raised at trial and which could be raised in a post-conviction petition may be reviewed on appeal even where the defendant failed to file a written post-trial motion. Because defendant challenged the search of his luggage in the trial court and could raise the issue in a post-conviction petition, the issue was not forfeited.

(Defendant was represented by Assistant Defender Amber Gray, Springfield.)

§56-1(b)(4)(a)

People v. Richardson, 2011 IL App (4th) 100358 (No. 4-10-0358, 11/29/11)

Generally, any error relating to jury instructions is forfeited if the defendant does not object or proffer alternative instructions at trial. An exception exists for the failure to instruct on the elements of a crime. The decision whether to instruct the jury on a lesser offense rests with defendant and is one of trial strategy.

Defendant elected to represent himself at trial. Therefore he was responsible for his own representation and was held to the same standards as any attorney. The court had no duty to advise defendant to introduce a lesser-offense instruction *sua sponte* or to inform defendant of the possibility of introducing the jury instruction. Because defendant represented himself at trial, he could not have usurped the decision whether to tender the instruction. Therefore, no error occurred.

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)